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November 28, 2012

Reference Number

032262.00000

BY HAND DELIVERY

Jeff S. Jordan
Supervisory Attorney
Complaints Examination &
Legal Administration
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

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FEDERAL ELECTION COMMISSION
2012 NOV 29 PM 4:25
OFFICE OF THE CLERK
U.S. HOUSE OF REPRESENTATIVES

Re: MUR 6657
Todd Akin, Todd Akin for Senate and G. Scott Engelbrecht, Treasurer

Dear Mr. Jordan:

This response, including exhibits, is submitted on behalf of Representative W. Todd Akin (R-MO) ("Rep. Akin"), Todd Akin for Senate ("Akin for Senate") and G. Scott Engelbrecht, in his official capacity as Treasurer of Akin for Senate, in response to a complaint filed on October 4, 2012 by Michael Sanders, Chairman of the Missouri Democratic State Committee.

The essence of the Democratic State Committee's complaint is that because staff for Akin for Senate responded to an inquiry from a political committee regarding Rep. Akin's position on banning earmarks, Rep. Akin, Akin for Senate and its Treasurer, G. Scott Engelbrecht, somehow violated 2 U.S.C. § 441a by knowingly accepting a contribution in excess of \$2,500 and also violated 2 U.S.C. § 441i(e) by soliciting contributions outside the limitations, prohibitions and

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reporting requirements of the Federal Election Campaign Act ("FECA" or "the Act"). The allegations of the complaint are entirely speculative, based on nothing more than the Democratic State Committee's politically motivated reading of a handful of press reports. The Democratic State Committee's complaint is factually incorrect and legally insufficient to justify the expenditure of the Federal Election Commission's ("FEC" or "the Commission") limited resources. For all the reasons stated below, the Commission should find that there is no reason to believe that Todd Akin, Akin for Senate or G. Scott Engelbrecht, in his official capacity as Treasurer of Akin for Senate, violated either 2 U.S.C. § 441a or 2 U.S.C. § 441i(e).

Summary of the Complaint

The Democratic State Committee's complaint is based entirely on a handful of press reports indicating that staff for Akin for Senate discussed Rep. Akin's position on banning earmarks with the staff of the Senate Conservatives Fund ("SCF"), a nonconnected committee.¹

Complaint at 2-3. From that innocuous fact the Democratic State Committee leaps to the conclusion that there must have been a secret agreement between the SCF and Akin for Senate that would "result in SCF running independent expenditures [i.e., advertisements] supporting Akin." Complaint at 3. Based on this unsubstantiated inference, the Democratic State Committee's complaint then alleges, "[a]ssuming that they have coordinated, should SCF sponsor communications in connection with the Missouri Senate election, Akin . . . would violate

¹ The Democratic State Committee's complaint incorrectly asserts that the SCF filed an amended Statement of Organization with the Commission on July 1, 2012 so that it could "operate as a so-called 'super PAC.'" Complaint at 2. In fact, there is nothing on the amended Statement of Organization to indicate that the SCF sought to change its status from a nonconnected committee to an independent expenditure-only committee.

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2 U.S.C. § 441a” Complaint at 4 (emphasis added). Similarly, the complaint then goes on to allege, “*If* Akin asked SCF to make expenditures in connection with his campaign, Akin would have solicited contributions in excess of the federal limits.” *Id.* (emphasis added).

Summary of the Facts and Legal Arguments

The Democratic State Committee’s complaint is based entirely on assumptions, which in turn are based on inferences drawn from a handful of press reports. Not surprisingly, this feeble house of cards collapses at the slightest touch. The only factually correct statement in the complaint is that staff for Akin for Senate did discuss Rep. Akin’s position on banning earmarks with staff for the SCF. Those discussions, however, were strictly limited to Rep. Akin’s position on that issue and did not include any discussion of the Akin for Senate campaign’s plans, projects, activities or needs. FEC regulations specifically exclude such discussions from the definition of a coordinated communication. 11 C.F.R. § 109.21(f). Moreover, the SCF never actually “[ran] independent expenditure [advertisements] supporting Akin.” The Commission has repeatedly rejected similar coordination complaints that “relied on speculative allegations based on media reports about a meeting between Respondents.” *See, e.g.*, First General Counsel’s Report in MUR 6059 (Sean Parnell for Congress) at 6-9. Accordingly, the Commission should conclude that none of the above respondents violated either 2 U.S.C. §§ 441a or 441i(e).

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Statement of Facts

The SCF is a nonconnected committee that supports candidates for federal office based on their positions on a number of issues, including a permanent ban on earmarks. *See*

<http://www.senateconservatives.com/site/about>. During September 2012, the Policy Director for Akin for Senate, Justin Johnson, returned a telephone call from Matt Hosford on the SCF staff who wanted to know Rep. Akin's position on banning earmarks. *See* Affidavit of Justin Johnson, ¶¶ 2-3 (attached hereto as Exhibit 1). Mr. Johnson had several conversations with Mr. Hosford, but these conversations were strictly limited to Rep. Akin's position on the issue of banning earmarks and the rules of the U.S. Senate and House of Representatives governing earmarks. Exhibit 1 at ¶ 3. At no time did Mr. Johnson or anyone else on the Akin for Senate campaign discuss the campaign's plans, projects, activities or needs with Mr. Hosford or any other agent of the SCF. Exhibit 1 at ¶ 4. Moreover, at no time did Mr. Johnson or anyone else on the Akin for Senate campaign discuss, request or suggest to Mr. Hosford or any other agent of the Senate Conservatives Fund that the SCF pay for advertisements supporting the election of Todd Akin to the U.S. Senate or opposing the election of Claire McCaskill to the U.S. Senate. Exhibit 1 at ¶ 5.

On September 27, 2012, the SCF posted a notice on its web sites announcing the results of a survey of its membership regarding the U.S. Senate race in Missouri. More than 8,000 responses to the survey were received and 93% of those responding said the SCF should endorse Todd

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Akin for U.S. Senate. Accordingly, SCF endorsed Todd Akin for U.S. Senate and urged its members to use the SCF web site to make conduit contributions to Akin for Senate. See <http://www.senateconservatives.com/site/post/1583/todd-akin-survey-results>. The SCF, however, never paid for any advertisements supporting the election of Todd Akin to the U.S. Senate.

Legal Arguments

The central allegation in this matter is that Todd Akin, Akin for Senate and its treasurer, G. Scott Engelbrecht, violated 2 U.S.C. § 441a by accepting an in-kind contribution of more than \$2,500 from the SCF in the form of advertisements supporting Todd Akin for Senate. Complaint at 3. The short answer to this allegation is that the SCF never paid for any advertisements supporting Todd Akin for Senate. Even if the SCF had paid for such advertisements there would have been no prohibited in-kind contribution to Akin for Senate because there were no coordinated communications between Akin for Senate and the SCF.

Responding to an Inquiry Regarding a Candidate's Position on a Policy Issue is Not a Coordinated Communication

The Act provides that an expenditure for a communication made by any person "in cooperation, consultation, or concert, with, or at the suggestion of," a candidate or his authorized committee or agent is a contribution to the candidate. 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, his authorized committee or their agents if the communication is

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(1) paid for by a person other than the candidate or his authorized committee; (2) satisfies at least one of the content standards described in 11 C.F.R. § 109.21(c); and (3) satisfies at least one of the conduct standards in 11 C.F.R. § 109.21(d). 11 C.F.R. § 109.21(a)(1)-(3). None of these requirements is met here.

The first prong of the coordinated communication test is not satisfied because the SCF never paid for any advertisements supporting Todd Akin for Senate. Because there were no advertisements, the content prong of the coordinated communications test is also not satisfied. Finally, the conduct prong of the coordinated communication test is not satisfied because responses to an inquiry regarding a candidate's positions on legislative and policy issues are specifically excluded from the conduct standards of 11 C.F.R. § 109.21(d).

The conduct standard is met if, among other things, the advertisement was (1) created, produced, or distributed at the request or suggestion of a candidate or his campaign or the candidate or his campaign assents to such an advertisement, (2) the candidate or his campaign was materially involved in decisions regarding the advertisement, or (3) the advertisement was created, produced or distributed after substantial discussions with the candidate or his campaign. 11 C.F.R. § 109.21(d)(1)-(3). Indeed, the Democratic State Committee's entire complaint is premised on its contention that the discussions between Akin for Senate and the SCF ran afoul of the conduct prong of the coordinated communication test. Complaint at 3.

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As the Democratic State Committee is undoubtedly aware, this argument is fatally flawed because the Commission's regulations specifically exclude responses to inquiries regarding a candidate's position on legislative or policy issues from the conduct prong of the coordinated communications test. The regulations provide a safe harbor for such communications by specifying that, "[a] candidate's . . . response to an inquiry about that candidate's . . . positions on legislative or policy issues, but not including a discussion of campaign plans, projects, activities or needs, *does not satisfy any of the conduct standards in*" 11 C.F.R. 109.21(d). 11 C.F.R. 109.21(f)(emphasis added).

The communications between Akin for Senate and the SCF fall squarely within this safe harbor. According to the sworn affidavit of Akin for Senate Policy Director Justin Johnson, the SCF's Matt Hosford initiated the communication by inquiring about Rep. Akin's position on earmarks. Exhibit 1 at ¶ 3. The communications between Akin for Senate and the SCF were strictly limited to Rep. Akin's position on earmarks and the House and Senate rules governing earmarks. *Id.* Moreover, at no time were there any discussions regarding the campaign's plans, projects, activities or needs. *Id.* at ¶ 4.

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Because the communications between Akin for Senate and the SCF were clearly permissible under FEC regulations, the Commission must find that there is no reason to believe that Todd Akin, Akin for Senate or its Treasurer, G. Scott Engelbrecht, violated 2 U.S.C. § 441a.²

The Commission Has Repeatedly Rejected Speculative Complaints Unsupported by Specific Information

As the Commission is well aware, the Act's requirements for filing a complaint are so minimal that they virtually invite complaints based on pure speculation. *See* 2 U.S.C. 437g(a)(1). The complaint in this matter alleges that the respondents violated 2 U.S.C. § 441a based on nothing more than inferences drawn from a handful of press reports. Complaint at 3-4. The complaint's allegation that Todd Akin, Akin for Senate and its Treasurer, G. Scott Engelbrecht, violated 2 U.S.C. § 441i(e) is totally unsupported by any specific facts whatsoever. Complaint at 4.

"Enough is enough." *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 127 S. Ct. 2652, 2672 (2007). The Commission has repeatedly rejected complaints that provided no specific facts to support allegations that the Act was violated and respondents have rebutted the unsubstantiated allegations with sworn affidavits. *See, e.g.*, First General Counsel's Report in MUR 6358 (Jaime for Congress) at 9-11. This is especially true in cases alleging violations of the conduct

² The Democratic State Committee's complaint alleges that Akin for Senate engaged in coordinated communications regarding "running independent expenditures [i.e., advertisements] supporting Akin." Complaint at 3. The complaint does not allege that the notice posted on the SCF's web site endorsing Todd Akin for Senate was an excessive in-kind contribution. Even if the Democratic State Committee were to make such an argument, it would be to no avail because the safe harbor of 11 C.F.R. § 109.21(f) would still apply.

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prong of the coordinated communications test. *Id.*; First General Counsel's Report in MUR 6059 (Sean Parnell for Congress) at 6-9 ("complaint relied on speculative allegations based on media reports about a meeting between Respondents."); Factual and Legal Analysis in MUR 5823 (Citizens Club for Growth) at 7-12 (sworn affidavits refuted speculative allegations in the complaint regarding conduct of common vendors); Factual and Legal Analysis in MUR 5754 (MoveON.org Voter Fund) at 3-4 (sworn declarations rebutted allegations that the conduct standard was violated based on reports that the candidate and his wife attended a house party); Factual and Legal Analysis in MUR 5750 (Laffey U.S. Senate) at 6 (allegation of a close relationship was "too attenuated and speculative to support an inference that the parties engaged in coordination" and allegations were rebutted by an affidavit). *See also* First General Counsel's Report in MUR 5774 (Lamborn for Congress) at 4 (sworn affidavit rebutted allegations based on a series of inferences and assumptions).

The Democratic State Committee's allegations that Todd Akin, Akin for Senate and its Treasurer, G. Scott Engelbrecht, violated the conduct prong of the coordinated communications test have been directly rebutted by the sworn affidavit of Justin Johnson. The allegation that the candidate, his authorized committee or their agents violated 2 U.S.C. § 441i(e) is not supported by any specific facts. Under these circumstances there is simply no basis for the Commission to conclude that there is reason to believe that any of the above respondents violated either 2 U.S.C. § 441a or 2 U.S.C. § 441i(e).

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Conclusion

For all the reasons discussed above, the Commission should find that there is no reason to believe that Todd Akin, Akin for Senate or G. Scott Engelbrecht, in his official capacity as Treasurer of Akin for Senate, violated either 2 U.S.C. § 441a or 2 U.S.C. § 441i(e).

Sincerely,



Brett G. Kappel
Counsel for W. Todd Akin, Todd Akin for
Senate and G. Scott Engelbrecht

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EXHIBIT 1